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No. 445

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

AVCO CORPORATION,

Petitioner,

v.

AERO LODGE NO. 735, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Avco Corporation, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case on May 2, 1967.

OPINION BELOW

The opinion of the Court of Appeals is officially reported in 376 F.(2d) 337 and appears herein as Appendix A, at pp. App. 1-12.

JURISDICTION

The judgment of the Court of Appeals was entered on May 2, 1967 (Appendix A, *infra*, p. App. 11). This Court has jurisdiction under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether a State Court action by an employer seeking an injunction for breach of the "no-strike clause" in a collective bargaining agreement may be removed to the United States District Court as a case arising under the laws of the United States of which the Federal Court would have original jurisdiction; and (2) whether, after removal, a State Court injunction previously issued enforcing a "no-strike clause" should be dissolved by the United States District Court.

STATUTES INVOLVED

This case involves Sections 1441 and 1447 of the Removal Act of 1948, 62 Stat. 937, 939; Section 4 of the Norris-LaGuardia Act of 1932, 47 Stat. 70; and Section 301 of the Labor Management Relations Act of 1947, 61 Stat. 156. The relevant statutory provisions are set forth in Appendix B, *infra*, pp. App. 13-15.

STATEMENT

The State Chancery Court suit.

On October 15, 1965, Petitioner filed its Bill of Complaint in the Chancery Court for Davidson County, Tennessee, praying for injunctive relief against recurrent strikes in violation of the express "no-strike" commitment in its collective bargaining agreement with Aero Lodge No. 735, International Association of Machinists and Aerospace

Workers (herein called "Aero Lodge"), as well as in violation of the explicit prohibition against work stoppages contained in the grievance and arbitration procedures of that agreement. The Bill averred facts showing that the interruptions of work had obstructed or halted vital production for the national defense, including military hardware then actively utilized in Vietnam, and that the legal remedy was inadequate. Named as defendants were Aero Lodge and numerous persons joined individually and as officers or committee members of Aero Lodge, together with other persons joined individually and as representatives of the class engaged in the activities alleged. (P.A. 2a-10a)[1]

On the same date, a Chancellor of the Chancery Court for Davidson County directed the issuance of a temporary injunction as prayed for, upon the giving of an appropriate bond in the amount of $10,000.00. (P.A. 10a)

The proceedings in the U. S. District Court.

The defendants named in the Bill thereupon filed a Petition for removal of the cause to the United States District Court for the Middle District of Tennessee, Nashville Division. (P.A. 11a) Immediately thereafter, they filed in the District Court a motion to dissolve the temporary injunction, and to dismiss the case, advancing the argument that the complaint sought, and Petitioner had been granted, relief which the District Court had no power to issue and maintain under the limitations of the Norris-La-Guardia Act.[2]

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[1] The Appendix to its Brief filed by Petitioner in the court below, a certified copy of which has been filed herein pursuant to Rule 21, will be referred to as Petitioner's Appendix ("P.A.").

[2] 47 Stat. 70, 29 U.S.C. § 104.

Petitioner promptly moved in the District Court to remand the cause to the Chancery Court for Davidson County, urging (1) that the suit was not founded on a claim arising under the laws of the United States, as averred in the removal Petition, but instead was founded on a claim of breach of contract arising under state law, and (2) that the District Court, by reason of the Norris-LaGuardia Act, had no original jurisdiction satisfying the requisites of the Removal Act.[3]

The District Court by its order entered March 2, 1966, denied the Petitioner's motion to remand, granted the motion to dissolve the injunction, and denied the motion to dismiss the action. (P.A. 16a-21a). In refusing to remand the cause to the Tennessee Chancery Court, the District Court expressly recognized that the Court of Appeals for the Third Circuit had held squarely to the contrary in *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers* (CA 3; 1964) 338 F. (2d) 837; cert. den. (1965) 380 U.S. 935. (P.A. 17a)

After a motion for reconsideration before the District Court was denied by an order entered on March 23, 1966, an appeal was taken by Petitioner to the Court of Appeals for the Sixth Circuit. (P.A. 35a-36a)

The decision of the Court of Appeals.

On appeal the Court of Appeals refused to accept the holding of its sister Circuit in *American Dredging*[4] and

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[3] The joinder of Tennessee citizens as defendants rendered the case removable only under Section 1441(b), which in turn necessitates the establishment of "arising under" jurisdiction founded on the "laws of the United States." 62 Stat. 937, 28 U.S.C. § 1441(b).

[4] *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers, supra.*

affirmed the judgment of the District Court. (Appendix A, *infra*) Rejecting the concept that Petitioner's suit in the Chancery Court had been based exclusively upon a state-created right, the Court of Appeals characterized all actions involving the breach of collective bargaining agreements in industries affecting interstate commerce as preemptively governed by Section 301 of the Labor Management Relations Act.[5] According to the Sixth Circuit's reading of *Lincoln Mills* and *Lucas Flour*[6], state law no longer exists "as an independent source of private rights to enforce collective bargaining contracts." (Appendix A, *infra*, p. App. 5) Also, federal law does not permit continued injunctive enforcement of collective bargaining agreements by state courts.

Having depicted Petitioner's action as one arising under the laws of the United States and, therefore, removable, the Court of Appeals went on to declare that Section 4 of the Norris-LaGuardia Act[7] did not withdraw jurisdiction of the Petitioner's suit from the federal courts so as to defeat removal. In so doing, the court below emphatically rejected the Third Circuit's decision in *American Dredging*. That court had stated that the proposition that a court might have subject matter jurisdiction without the concomitant power to grant a final decree on the merits was " . . . what Mr. Justice Frankfurter once characterized, in

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[5] 29 U.S.C. § 185.

[6] *Textile Workers* v. *Lincoln Mills* (1957) 353 U.S. 448; *Teamsters Local 174* v. *Lucas Flour Co.* (1962) 369 U.S. 95.

[7] 29 U.S.C. § 104.

another context, 'a fox-hunting theory of justice that ought to make Bentham's skeleton rattle' . . .'"[8]

The Court of Appeals approved the action of the District Court in dissolving the State Court injunction previously issued. The Court of Appeals recognized that Norris-LaGuardia "specifically applies only to the federal court" (Appendix A, *infra,* p. App. 9) but nonetheless announced the view that uniform development of the federal law of labor contracts would be undermined by the existence of the differing injunctive remedies available in the various states. Hence, the Court asserted that "the remedies available in state courts are limited to the remedies available under federal law." (Appendix A, *infra,* p. App. 10) In other words, because of the enactment in 1947 of Section 301 of the Labor Management Relations Act, 1947, Section 4 of the Norris-LaGuardia Act, which by its express terms refers only to "courts of the United States", has now been extended to apply to the courts of every state in the union. Summarizing the opinion of the Court of Appeals in its own words (Appendix A, *infra,* p. App. 11):

> "Avco's claim arises under the laws of the United States, and the complaint states an action over which the District Court had original jurisdiction. Federal labor policy must have uniform application. The Congress has declared that injunctions shall not issue to restrain peaceful picketing."

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[8] 338 F. (2d) 837, 842.

REASONS FOR GRANTING THE WRIT

1. There is a Conflict Among the Circuits.

On the issue of remand presented in this case, the Third circuit and the Sixth Circuits are squarely in conflict. In its opinion in the instant case, the Court of Appeals for the Sixth Circuit stated in unequivocal terms:

> "The question presented here is identical to the question presented in *American Dredging Co.* v. *Local 25, Marine Division, International Union of Operating Engineers,* 338 F.2d 837 (C.A. 3, 1964), cert. den. 380 U.S. 935 (1965). In *American Dredging, supra,* the Court remanded the case to the State Court on the ground that the action, based solely on a State created right, did not come within 38 U.S.C., Section 1441, which permits removal of a civil action to a Federal Court which has jurisdiction under a law of the United States. We decline to follow *American Dredging,* and affirm the judgment of the District Court." (App. A, *infra,* p. App. 3)

The District Courts which have considered the question are also divided on the subject of remand.[9] So are the

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[9] Remand granted: *Castle & Cooke Terminals, Ltd.* v. *Local 137, Longshoremen's Union* (D.C. Haw.; 1953) 110 F. Supp. 247; *Swift & Company* v. *United Packinghouse Workers of America, et al.* (D.C. Colo.; 1959) 177 F. Supp. 511; *Kroger Co.* v. *Retail Store Union, Local No. 1099* (D.C.S.D. Ohio; 1964) 56 LRRM 2893; *Kroger Co.* v. *Milk and Ice Cream Drivers, et al.* (D.C.S.D. Ohio; 1966) 61 LRRM 2692; *California Packing Corp.* v. *ILWU Local 142* (1966) 253 F. Supp. 597; *National Dairy Products Corp.* v. *Heffernan* (1961) 195 F. Supp. 153; *American Optical Co.* v. *Andert, et al.* (1952) 108 F. Supp. 252; *Merchant's Refrigerating Co.* v. *Warehouse Union* (N.D. Calif.; 1963) 213 F. Supp. 177; *Hat Corp. of America* v. *United Hatters* (D. Conn.; 1953) 114 F.

commentators.[10]

Because of the conflict among the federal courts, the law on this crucial question is currently in a state of confusion. A decision of the question by this Court is imperative.

2. **The Decision Presents an Important Question of Federal Law Which Has Not Been, And Should Be, Settled by This Court.**

A. Significance of the decision.

If the decision of the Sixth Circuit is correct, no employer can obtain injunctive relief in any court in the land against

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Supp. 890; *Sandsberry* v. *Gulf C. & S. F. Ry.* (N.D. Tex.; 1953) 114 F. Supp. 834; *Associated Telephone Co.* v. *CWA* (S.D. Calif.; 1953) 114 F. Supp. 334.

Remand denied: *Crestwood Dairy* v. *Kelly* (D.C.E.D. N.Y.; 1963) 222 F. Supp. 614; *Tri-Boro Bagle Co.* v. *Bakery Drivers Union* (D.C.E.D. N.Y.; 1963) 228 F. Supp. 720; *Publishers Assoc.* v. *Pressmen's Union* (D.C.S.D. N.Y.; 1965) 246 F. Supp. 293; *Fay* v. *American Cystoscope Makers* (S.D.N.Y.; 1951) 98 F. Supp. 278; *Food Fair Stores* v. *Retail Clerks* (E.D. Pa.; 1964) 229 F. Supp. 123; *S. E. Overton Co.* v. *Teamsters* (W.D. Mich.; 1953) 115 F. Supp. 764 and *Pocahontas Terminal Corp.* v. *Portland Building Council* (D. Me.; 1950) 93 F. Supp. 217.

[10] Articles and comments favoring remand: *Lesnick,* 79 Harv. L. Rev. 757; *Moskowitz,* 46 Boston U. L. Rev. 343; *Janofsky & Vaughn,* 7 B.C. Ind. & Com. L. Rev. 869; and comments in 65 Colum. L. Rev. 907; 41 Notre Dame Lawyer 88; 113 U. of Pa. L. Rev. 1096; 6 B.C. Ind. & Com. L. Rev. 957; 17 Mercer L. Rev. 442.

Articles and comments opposing remand: *Stern,* 39 Temp. L. Q. 65; *Aaron,* 63 Colum. L. Rev. 1027; *Ratner,* 38 F.R.D. 81; and comments in 78 Harv. L. Rev. 1665; 22 Wash. & Lee L. Rev. 255; 44 N.C. L. Rev. 188; 38 Temp. L. Q. 361; 51 Va. L. Rev. 973; 32 Tenn. L. Rev. 264; 60 Nw. U. L. Rev. 489; 19 Rutgers L. Rev. 507; and 52 Cornell L. Q. 132.

a peaceful strike in breach of contract, even though the legal remedy is clearly inadequate.

In *Sinclair Refining Co.* v. *Atkinson* (1962) 370 U.S. 195; 8 L.E. (2d) 440, this Court held that because of the provisions of Section 4 of the Norris-LaGuardia Act (47 Stat. 70; 29 U.S.C. § 104) no *federal* court may grant injunctive enforcement of a no-strike clause. In that decision, this Court recognized, however, that Norris-LaGuardia was intended to apply only to federal courts. At page 196, the Court stated that Norris-LaGuardia "barred *federal* courts from issuing injunctions." (Emphasis added) This construction was in accord with the plain language of the Act.[11] Thus, *Sinclair* did not itself close the door to continued injunctive relief in the state courts.

The instant case clearly goes beyond *Sinclair* and does close the doors of the state courts to injunctive relief. It holds that a suit for injunctive relief against violation of a no-strike clause is a suit arising under the laws of the United States (to-wit, Labor Management Relations Act, 1947, Section 301) and as such is removable to the district court under 28 U.S.C. 1441(b) as a suit "of which the district courts have original jurisdiction." Under this ruling all that any union has to do to prevent injunctive enforcement of its no-strike pledge is to remove the state court suit to federal court. By this single action, injunctive relief will be precluded. The court went even further and stated that the state courts themselves may no longer issue injunctions. The court said "The remedies available in State Courts are limited to the remedies available under Federal law." (Appendix A, *infra*, p. App. 10)

The questions presented have been anticipated by this Court. In *Charles Dowd Box Co.* v. *Courtney* (1962) 368

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[11] "No *court of the United States* shall have jurisdiction to issue any restraining order or temporary or permanent injunction * * * " (Emphasis added)

U.S. 502; 7 L.E. (2d) 483, the Court stated, in footnote 8, that:

> "In the course of argument at the Bar two questions were discussed which are not involved in this case, and upon which we expressly refrain from intimating any view—whether the Norris-LaGuardia Act might be applicable to a suit brought in a state court for violation of a contract made by a labor organization, and *whether there might be impediments to the free removal to a federal court of such a suit.* The relation of the Norris-LaGuardia Act to state courts applying federal labor law has never been decided by this Court. * * * And quite obviously *we have not yet considered the various problems concerning removal under* 28 USC § 1441." (Page 514; emphasis added)

Also, in his dissenting opinion in *Sinclair, supra,* Mr. Justice Brennan observed that "So long as state courts remain free to grant the injunctions unavailable in federal courts, suits seeking relief against concerted activities in breach of contract will be channeled to the States whenever possible." (370 U.S. at p. 226) He foresaw that if removal of such suits is allowed "the result * * * is that § 301 will have had the strange consequence of taking away a contract remedy available before its enactment." (370 U.S. at p. 227)

B. Importance of Specific Performance of the No-Strike Clause.

The importance to an employer of a specifically enforceable no-strike clause in a labor contract cannot be overstated. A well-known commentator has observed that:

> ". . . about all an employer can get in exchange for his commitment in a collective agreement is continued production—no work stoppages for the life of the agreement. Most employers assume that they don't get even this unless the union signs a no-strike pledge

and promises that the union officials will take action against wild-cat strikes and work stoppages. Of course, unions say that employers get a supply of labor in exchange for their concessions in collective agreements. But employers get no more labor now than they did before unions existed * * *"[12]

In *Lincoln Mills, supra,* this Court itself observed that in enacting Section 301 Congress was,

". . . interested in promoting collective bargaining that ended with agreements not to strike. The Senate Report, supra, p. 16 states:

'If unions can break agreements with relative impunity, then such agreements do not tend to stabilize industrial relations. The execution of an agreement does not by itself promote industrial peace. The chief advantage which an employer can reasonably expect from a collective labor agreement is assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract.'" (353 U.S. 453-454)

Persons with experience in this field are well aware that injunctive relief is the only "*effective* method of assuring freedom from economic warfare for the term of the agreement." (353 U.S. at p. 454; emphasis added) This Court pointed out in *NLRB* v. *Denver Building and Construction Trades Council,* (1951) 341 U.S. 675, that a mere placard, carried by one or two workers, can constitute a "signal, tantamount to a direction to strike." (Page 690) Obviously, when a strike thus initiated by a few in breach of contract throws hundreds or thousands of employees out of

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[12] *Gregory.* The Collective Bargaining Agreement: The Nature and Scope. (1949) Wash. U. L. Q. 3, 12.

work without pay and shuts down an entire plant, cutting off deliveries to customers and perhaps even resulting in a permanent shift of business relationships, money damages are "patently a miserable substitute for performance."[13] It has been aptly said that such a:

> ". . . strike in breach of contract irreparably harms the employer. Orders are lost. Customers transfer their favor to employers who meet deadlines. The discharge of strike leaders does not end the strike; at best, it stops further efforts. A damage action, tried years later to the vagaries of a jury, is small recompense to the employer denied business because he cannot deliver. Equitable relief is not only the most appropriate remedy, but also the only effective one."[14]

The damage remedy is peculiarly ineffective in a strike situation, because the discipline which makes the strike possible also enables the union leaders to insist on dismissal of the damage suit as a condition to ending the strike.[15] In many cases, therefore, the damage remedy is merely a mirage.

Under established principles of equity jurisdiction, injunctive relief is not granted unless the court first determines that the legal remedy is inadequate. It must be assumed, therefore, that the ruling in the instant case will preclude equitable relief even though the legal remedy is clearly inadequate.

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[13] *Rice*, Paradox of Our National Labor Law, 34 Marquette L. Rev. 233, 253, 235, note 15 (1951).

[14] *Stewart*, No Strike Clauses in the Federal Courts. (1961) 59 Mich. L. Rev. 673, 674-75.

[15] *Swigert*, "Where Labor Unions Get Their Power." U. S. News & World Report, January 21, 1965, at page 97.

C. The Errors in the Decision of the Sixth Circuit.

(1) Avco's state court suit did not arise "under the Constitution, treaties or laws of the United States."

An action is not removable under 28 U.S.C. § 1441 unless it is "founded on a claim or right arising under the Constitution, treaties or laws of the United States." The court below expressly found that "Avco's contention that its action is founded upon a breach of contract arising under State law is without merit" and that "Avco's claim is one arising under the laws of the United States." (App. A, *infra*, p. App. 5) It is submitted that these findings are erroneous.

State courts were enjoining strikes in breach of contract long before the enactment of Section 301. Subsequent to the enactment of Section 301, they have continued to grant injunctive relief.[16] Section 301 has mere-

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[16] *McCarroll* v. *Los Angeles County District Council* (1958) 49 Calif. (2d) 45; 315 Pac. (2d) 322; cert. den. 355 U.S. 932 (1958); *McLean Distributing Co.* v. *Brewery and Beverage Drivers* (1959) 254 Minn. 204; 94 N.W. (2d) 514; cert. den. (1959) 360 U.S. 917; *Dugdale Construction Co.* v. *Operative Plasterers Local 538 of Omaha* (1965) 257 Iowa 997; 135 N.W. (2d) 656; *General Building Contractors Assoc.* v. *Local 542* (1952) 370 Pa. 73; 87 Atl. (2d) 250; *Philadelphia Marine Trade Assoc.* v. *Longshoremen's Assoc.* (1955) 382 Pa. 326; 115 Atl. (2d) 733; cert. den. 350 U.S. 843; 100 L.E. 751; *Shaw Electric Co., Inc.* v. *IBEW Local Union No. 98* (1965) 418 Pa. 1; 208 Atl. (2d) 769; *Armco Steel Corp.* v. *Perkins* (1967) ..... Ky. .....; 411 S.W. (2d) 937; 64 LRRM 2539; *General Electric Co.* v. *UAW-CIO* (1952) 93 O.A. 139; 108 N.E. (2d) 211; app. dis. 158 O.S. 555; 110 N.E. (2d) 424; *Associated General Contractors* v. *Trout* (1961) 59 Wash. (2d) 90; 366 Pac. (2d) 16; *Alabama Cartage Co.* v. *International Brotherhood of Teamsters* (1948) 250 Ala. 372; 34 So. (2d) 576; *Dairymen's League Cooperative Assoc., Inc.* v. *F. A. Conrad*, 33 Misc. (2d) 914; 228 N.Y.S. (2d) 420; aff. 16 A.D. (2d) 869; 229 N.Y.S.

ly added an additional remedy. State jurisdiction is impaired only to the extent that doctrines of local substantive law are incompatible with federal substantive law. *Local 174* v. *Lucas Flour Co.* (1962), 369 U.S. 95; 7 L.Ed. (2d) 593, at pages 102-104. Injunctive relief involves no conflict of substantive law.

Clearly, Aveo's suit, brought in state court, was not "founded on a claim or right arising under" Section 301. In *Charles Dowd Box Co.* v. *Courtney, supra,* this Court stated that:

> "On its face § 301(a) simply gives the federal district courts jurisdiction over suits for violation of certain specified types of contracts. The statute does not state nor even suggest that such jurisdiction shall be exclusive." (368 U.S. at page 506)

(2d) 736 (1962); *Bee Line, Inc.* v. *Long Island Local 252, Transport Workers Union of America, CIO* (1956) 157 N.Y.S. (2d) 232; *Anchor Motor Freight* v. *Local Union No. 445 of the International Brotherhood of Teamsters,* 12 Misc. (2d) 757; 171 N.Y.S. (2d) 506; aff. 5 A.D. (2d) 869; 171 N.Y.S. (2d) 511 (1958); further proceedings reported at 10 A.D. (2d) 994; 204 N.Y.S. (2d) 98; 11 A.D. (2d) 766; 204 N.Y.S. (2d) 891; *Republic Aviation Corp.* v. *Republic Lodge No. 1987, International Assoc. of Machinists* (1957) 10 Misc. (2d) 783; 169 N.Y.S. (2d) 651; *McLean Trucking Co.* v. *Doyle,* 17 Misc. (2d) 478; 184 N.Y.S. (2d) 114; aff. 8 A.D. (2d) 789; 188 N.Y.S. (2d) 943 (1959); motion for leave to app. den. 9 A.D. (2d) 677; 193 N.Y.S. (2d) 223; *A. I. Gage Plumbing Supply Co.* v. *Local 300 of International Hod Carriers, Building & Common Laborers Union,* 202 Calif. App. (2d) 197; 20 Calif. Rep. 860; 92 A.L.R. (2d) 1223 (1962); *Foley Construction Co.* v. *Truck Drivers, Chauffeurs and Helpers Local No. 100, et al.* (1960) 85 Abs. 332, 14 O.P. (2d) 59, 172 N.E. (2d) 170.

The Court stated that:

> "The legislative history makes clear that *the basic purpose of § 301(a) was not to limit, but to expand, the availability of forums* for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that *Congress expressly intended not to encroach upon the existing jurisdiction of the state courts.*" (Pages 508-509; emphasis added)

The Court further said that:

> "The clear implication of the entire record of the congressional debates in both 1946 and 1947 is that the purpose of conferring jurisdiction upon the federal district courts *was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations.*" (At page 511)

and also stated that,

> ". . . the entire tenor of the 1947 legislative history confirms that the purpose of § 301, like its counterpart in the Case bill, was to fill the gaps in the jurisdictional law of some of the States, *not to abolish existing state court jurisdiction.*" (Pages 511, 512; emphasis added)

The Court quoted Senator Ferguson as stating, with respect to Section 301, "*It takes away no jurisdiction of the State courts.*" (Page 512; emphasis added) The Court observed that:

> "Section 301(a) reflects congressional recognition of the *vital importance of assuring the enforceability of such agreements.*" (Page 509; emphasis added)

Similarly, in *Sinclair Refining Co.* v. *Atkinson, supra,* the Court quoted the House Conferees as having "agreed that suits for breach of such agreements should remain

wholly private and 'be left to the usual processes of the law.' " (370 U.S. at page 207)

This Court has recently stressed that:

> ". . . labor legislation is peculiarly the product of legislative compromise of strongly held views, * * * and that legislative history may not be disregarded merely because it is arguable that a provision may unambiguously embrace conduct called in question."

NLRB v. *Allis-Chalmers Mfg. Co.* (1967), ... U.S. .....; 65 LRRM 2449, 2450; Accord: *National Woodworkers Assn.* v. *Labor Board* (1967), ... U.S. .....; 64 LRRM 2801. In *Lincoln Mills, supra,* the Court forecast that the decision in that case would give rise to future problems,

> ". . .in the penumbra of express statutory mandates. Some will lack express statutory sanction but will be solved by looking at the policy of the legislation and fashioning a remedy that will effectuate that policy. The range of judicial inventiveness will be determined by the nature of the problem." (353 U.S. at page 457)

In the face of the above pronouncements of Congress and of this Court with respect to national policy, it seems evident that the Sixth Circuit erred in its interpretation and application of national policy. That court said:

> "Though Section 4 [of Norris-LaGuardia] specifically applies only to Federal Courts, there was, nevertheless, a clear declaration of congressional policy against enjoining peaceful picketing which we must now follow and apply as part of Federal labor law." (Appendix A, *infra,* p. App. 9)

The court does not clarify when this "clear declaration of congressional policy against enjoining peaceful picketing"

occurred. Certainly Norris-LaGuardia, enacted in 1932, contained no declaration of congressional policy against a state court enjoining peaceful picketing, because, admittedly, Norris-LaGuardia "applies only to Federal Courts." Also, a mere reading of the provisions of the statute, the congressional reports and debates, and the decisions of this Court quoted, *supra*, demonstrates that in 1947, when the LMRA was enacted, there was no "declaration of congressional policy against enjoining peaceful picketing." The policy of Congress in 1947 was to recognize the importance of the role played by state courts in enforcing collective bargaining agreements and to make labor contracts *more* enforceable—not *less* enforceable by adding Federal court jurisdiction which did not previously exist.

As pointed out above, Senate Report No. 105, 80th Cong., 1st Sess., quoted in *Lincoln Mills, supra,* emphasized that:

> "Without some *effective* method of *assuring* freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign such a contract." (At page 16)

and further stated that:

> "Statutory recognition of the collective agreement as a valid, binding, and *enforceable* contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace." (Pages 16-18; emphasis added)

In *Lincoln Mills, supra,* to be sure, the Court did conclude that:

> ". . . the *substantive* law to apply in suits under § 301 (a) is federal law which the courts must fashion from the policy of our national labor laws." (353 U.S. at page 456; emphasis added)

Likewise, in *Lucas Flour, supra,* the Court stated that:

> "The dimensions of § 301 require the conclusion that *substantive* principles of federal labor law must be paramount in the area covered by the statute." (369 U.S. at page 103; emphasis added)

A congressional policy in favor of "substantive" uniformity does not, of course, require "procedural" or "remedial" uniformity. This is one of the places where the reasoning of the Sixth Circuit falls down, and where its reliance on "Federal preemption" (Appendix A, *infra,* p. App. 5) is erroneous. This Court specifically rejected the concept of total preemption, as distinguished from mere substantive preemption, when it stated in *Dowd, supra,* at page 513:

> "Congress expressly rejected that policy [federal preemption] with respect to violations of collective bargaining agreements by rejecting the proposal that such violations be made unfair labor practices. Instead, *Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law.'*" (Emphasis added)

This Court has always stressed that there are necessarily many exceptions to the Federal preemption concept. In *San Diego Building Trades Council* v. *Garmon* (1959), 359 U.S. 236; 3 L.E. (2d) 775, the Court noted that it had refused to hold state remedies preempted,

> ". . . where the activity regulated was a merely peripheral concern of the Labor Management Relations Act . . . [*or*] *touched interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress has deprived the States of the power to act.*". (At pages 243-244; emphasis added)

Injunctive enforcement of the no-strike clause by state courts is "deeply rooted in local feeling and responsibility." As shown in footnote 16, *supra*, the higher courts of many states have continued to grant such relief following the enactment of Section 301 in 1947. Moreover, ten of the twenty-four States which currently have "little Norris-LaGuardia Acts", either through express legislative action or court construction, do not apply such Acts to strikes in breach of contract.[17]

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[17] Colorado, Col. Rev. Stat. Ann. § 80-5-6(2)(c) (1963); Kansas, Kan. Stat. Ann. § 44-809(15) (1964); Louisiana, act declared unconstitutional in *Douglas Pub. Serv. Corp.* v. *Gaspard*, 225 La. 972, 74 So. 2d 182 (1954); Minnesota, Minn. Stat. § 179.11(1) (1961), see *McLean Distrib. Co.* v. *Brewery Drivers Union*, 254 Minn. 204, 94 N.W.2d 514, cert. denied, 360 U.S. 917 (1959); Montana, see *State* v. *District Court*, 61 L.R.R.M. 2159 (Mont. Sup. Ct. 1965); New York, post-Sinclair: *Perry & Sons* v. *Robilotto*, 23 App. Div. 2d 949, 260 N.Y.S.2d 158 (1965); *Stretcher-Traung Lithograph Corp.* v. *Lithographers Union*, 46 Misc. 2d 925, 260 N.Y.S.2d 1011 (Sup. Ct. 1965); *Thaddeus Suski Productions* v. *Vola*, 47 Misc. 2d 773, 263 N.Y.S.2d 275, aff'd, 24 App. Div. 559, 260 N.Y.S.2d 826 (1965); *Employer's Ass'n* v. *International Union*, 60 L.R.R.M. 2006 (N.Y. Sup. Ct. 1965); *Eastern Freightways* v. *Deperno*, 57 L.R.R.M. 2299 (N.Y. Sup. Ct. 1964) (not officially reported). Pre-Sinclair: *Dairymen's Ass'n* v. *Conrad*, 16 App. Div. 2d 869, 229 N.Y.S.2d 736 (1962); *Anchor Motor Freight Corp.* v. *Local 445, Int'l Bhd. of Teamsters*, 5 App. Div. 2d 869, 171 N.Y.S.2d 511 (1958), and *McLean Trucking* v. *Doyle*, 8 App. Div. 2d 789, 188 N.Y.S.2d 943 (1959); Oregon, see *Weisfield* v. *Haeckel*, 28 L.R.R.M. 2055 (Ore. Cir. Ct. 1951); Pennsylvania, Pa. Stat. Ann., Tit. 43, § 206(d)(a) (1959); see *Philadelphia Marine Trade Ass'n* v. *ILA*, 382 Pa. 326, 115 A.2d 733 (1955), cert. denied, 350 U.S. 843 (1956); Washington, injunction provisions of Act declared unconstitutional in *Blanchard* v. *Golden Age Brewing Co.*, 188 Wash. 396, 63 P.2d 397 (1936); see also *Associated Gen'l Contractors* v. *Trout*, 59 Wash. 2d 90, 366 P.2d 16 (1961); Wisconsin, Wis. Stat. § 111.06(2)(c) (1963).

In *Vaca* v. *Sipes* (1967) ..... U.S. .....; 17 L.E. (2d) 842, the Court reviewed exceptions to the federal preemption rule and stated:

> "While these exceptions in no way undermine the vitality of the pre-emption rule where applicable, they demonstrate that the decision to pre-empt federal and state court jurisdiction over a given class of cases must depend upon the nature of the particular interests being asserted and the effect upon the administration of national labor policies of concurrent judicial and administrative remedies." (At page 852)

The Court, in holding that the duty of fair representation had not been preempted by the LMRA, and could still be enforced by a state court, observed that:

> "The federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employee organization and collective bargaining. * * * The existence of even a small group of cases in which the Board would be unwilling or unable to remedy a union's breach of duty would frustrate the basic purposes underlying the duty of fair representation doctrine. For these reasons, we cannot assume from the NLRB's tardy assumption of jurisdiction in these cases that Congress, when it enacted N.L.R.A. § 8(b) in 1947, intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." (At page 853)

The analogy to the instant situation seems clear.

In 1947, a policy of extending the Norris-LaGuardia restrictions to state courts was never mentioned or considered by Congress; neither was the policy of making existing state court suits removable through enactment of Section 301. In the absence of a clear expression of congressional intent to effectuate such results, and in the face of

clearly expressed congressional intention to preserve "the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations", the Sixth Circuit was in error in basing its decision on "congressional policy." This Court has specifically recognized that a policy favoring uniformity with respect to substantive law does not necessarily apply to remedy. In *UAW-CIO* v. *Hoosier Cardinal Corp.* (1966) 383 U.S. 696; 16 L.E. (2d) 192, the Court stated that lack of uniformity in remedy is "unlikely to frustrate in any important way the achievement of any significant goal of labor policy." (Page 702)

Congress clearly intended that state courts should retain the right to construe collective bargaining agreements. *Charles Dowd Box Co., supra.* The process of construing a no-strike clause in a money damage suit is no different from the process of construing such a clause in an injunction suit. The only point at issue, therefore, relates to remedy. In the interests of uniformity did Congress intend to deprive the state courts of a traditional remedy? Nothing in the legislative history indicates such an intention.

In *Lucas Flour, supra,* the Court stated that a "basic policy of national labor legislation" was "to promote the arbitral process as a substitute for economic warfare." (369 U.S. at page 105) Accord: *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.* (1960) 363 U.S. 574; 4 L.E. (2d) 1409. A strike in breach of contract to circumvent the contract grievance procedure does not "promote the arbitral process" but blocks arbitration. It substitutes economic warfare for the agreed arbitral process. The impact of Section 301, and its relationship to Norris-LaGuardia and the Removal Act, must be construed in the light of dominant congressional policy, which was to make

collective bargaining agreements more enforceable through preserving the established jurisdiction of the state courts (including jurisdiction to issue injunctions) and adding an additional federal court damage remedy.

The significance of such policy factors in arriving at a correct decision in the instant situation has been recognized by commentators. One writer who has given the problem thorough analysis states that;

> "... the solution to this problem should depend upon competing policy considerations rather than a sifting of purely legal considerations. Any decision in this area should be rendered only after the policy of section 301—to make available more effective means of enforcing collective bargaining agreements—is carefully considered. The allowance of state court injunctions and the denial of removal would be one means of furthering that policy."[18]

In the words of another commentator:

> "[I]f state courts do still have the power to enjoin such strikes [in breach of contract], permitting removal would put the removal statutes to a use for which they were never intended. Although the legislative history of the Judicial Code provides no substantial insight into the congressional purpose in allowing removal of suits involving federal questions, removal was certainly not intended to foreclose entirely remedies legitimately available in state courts."[19]

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[18] *Moskowitz,* Enforcement of No-Strike Clauses by Injunction, *supra,* at page 359.

[19] 113 U. of Pa. L. Rev. 1098. Professor Moore is in accord: "The majority view, which we believe is sound, is that the federal district court must remand suits requesting injunctive relief that is beyond the federal court's original jurisdiction, even when the action couples a prayer for damages, and even when the federal court believes that the state court lacks jurisdiction." *Moore,* Federal Practice, pages 1004-5, also, see page 1009.

(2) The District Court did not "have jurisdiction" of the cause.

The Sixth Circuit was also in error in finding that the district court had "jurisdiction" of the cause within the meaning of 28 U.S.C. § 1441(b). Although "jurisdiction" is a word with many meanings[20] it basically means the right to speak. In the instant case, the Petitioner sought injunctive relief against a peaceful strike in breach of contract. In the federal courts such relief is explicitly forbidden by Section 4 of Norris-LaGuardia (29 U.S.C. § 104). It is true, as observed by the Sixth Circuit, that Norris-LaGuardia permits federal injunctions under certain circumstances. These exceptions are set forth in Section 7 (29 U.S.C. § 107). None are applicable to the instant situation. Under Section 7, before a federal court is empowered to issue an injunction, there must be a finding that "unlawful acts" have been threatened or committed, and that "the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection." Of course, such requirements cannot be met where the strike in breach of contract is peaceful. Therefore, it is correct to say that in such a situation, because of Norris-LaGuardia, no federal court has the power to issue an injunction. Surely a court cannot be said to have "jurisdiction" when it is powerless to grant the relief sought by the litigant.

The federal courts have been divided on the meaning of the word "jurisdiction" contained in 28 U.S.C. § 1441. Some have held that "jurisdiction" means merely the capacity to entertain a lawsuit even though the court is

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[20] *Chafee*, Some Problems of Equity (1950) (pages 301-303).

powerless to grant the relief sought.[21] Others have held that "jurisdiction" as used in the statute requires both the capacity to entertain the lawsuit and the power to grant all of the relief sought, and accordingly have granted remand in strike injunction cases.[22] These latter cases, making the power to give the relief sought an ingredient in "jurisdiction", are, as pointed out by the Third Circuit in *American Dredging, supra,* consistent with earlier decisions of this Court, including this Court's decision in *General Investment Co.* v. *New York Central* (1926) 271 U.S. 228; 70 L.E. 920, where the Court stated, at page 230:

> "By *jurisdiction* we mean *power to entertain the suit, consider the merits* and *render a binding decision thereon* * * *" (Emphasis added; quoted in *American Dredging, supra,* at page 840)

It is submitted that such cases are also consistent with federal labor policy.

For the reasons set forth in great detail by the Third Circuit in its *American Dredging Co.* decision, and which, therefore, need not be repeated here, it is submitted that

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[21] *Publishers' Assoc.* v. *New York Newspaper Printing Pressmen's Union* (S.D.N.Y.; 1965) 246 F. Supp. 293; *Crestwood Dairy* v. *Kelly* (E.D. N.Y.; 1963) 222 F. Supp. 614; *S. E. Overton Co.* v. *Teamsters* (W.D. Mich.; 1953) 115 F. Supp. 764; *Pocahontas Terminal Corp.* v. *Portland Building Council* (D. Me.; 1950) 93 F. Supp. 217.

[22] *American Dredging Co.* v. *Local 25* (CA 3; 1964) 338 F. (2d) 837; cert. den. (1965) 380 U.S. 935; *Merchant's Refrigerating Co.* v. *Warehouse Union, supra; National Dairy Products Corp.* v. *Heffernan, supra; Hat Corp. of America* v. *United Hatters, supra; Sandsberry* v. *Gulf C. & S. F. Ry., supra; Associated Telephone Co.* v. *CWA, supra; Castle & Cooke Terminals, Ltd.* v. *Local 137, supra; Kroger Co.* v. *Milk and Ice Cream Drivers, et al., supra.*

the district court did not have "jurisdiction" of the instant case, and that for this reason also remand should have been granted.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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